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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 878.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Petitioner*,

vs.

JANE SAXE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, The Prudential Insurance Company of America, respectfully shows unto this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

This proceeding began October 4, 1938, by the filing of a suit by Petitioner in the District Court of the United States for the District of Columbia to cancel a policy of insurance, issued December 17, 1936 in the sum of $10,000.00 on the life of Alexander T. Saxe, obtained by the fraud of the insured in concealing that he had previously spent two weeks in a hospital and had been attended by physicians within three years preceding his application, and that he had been treated for a duodenal ulcer, none of which facts were disclosed in his application for the policy (R. 1).

On the next day, October 5, 1938, the original beneficiary, Jane Saxe, wife of the insured, instituted a suit against Petitioner in the same court to recover the proceeds of the policy (R. 13) and, subsequently, Gertrude T. Saxe, mother of the insured, was permitted to intervene in that case as a party plaintiff claiming the entire proceeds as beneficiary under a later designation (R. 24).

The District Court held that these claims to the proceeds of the policy were not compulsory counterclaims in the original proceeding brought by Petitioner and that they could be maintained as a separate action despite the provisions of Rule 13 of the Federal Rules of Civil Procedure. Over the objection of Petitioner, the two suits were tried together to a jury and the claimants to the policy proceeds were allowed to open and close (R. 25, 35).

The application, which was attached to and delivered with the policy as a part thereof, was received in evidence with the policy and showed that the insured represented that he had never been in a hospital, santarium or other institution for observation, diagnosis, rest or treatment, that he had not consulted or been attended by a physician during the preceeding three years, and that he had never had a disease of the kidneys, dizziness or gastric or duodenal ulcers (R. 153, questions 6D, 9A, 10A, part 1).

The proofs of death, which were received in evidence, showed that the insured died from a disease of the kidneys from which he had suffered at least ten years (R. 185, question 6).

At the trial Petitioner produced the testimony of Dr. Jacob Fine and the records of Beth Israel Hospital, in Boston, which established that the insured had been taken sick on a train in January, 1934, (R. 45, 159) had consulted Dr. Fine who, suspecting a bleeding duodenal ulcer, placed him in the hospital on January 16, 1934 (R. 47); that he underwent numerous examinations and tests and was attended by three other doctors while there (R. 47, 155-183), and when he was discharged on January 30, 1934, there was a definite diagnosis of duodenal ulcer (R. 48, 155). Petitioner also offered testimony from its Assistant Medical Director to show that the answers to questions propounded in the application were material to the acceptance of the risk but the trial court refused to receive such testimony on the ground that materiality was a question of law (R. 53). The trial court did receive evidence as to the general practice of insurance companies that in the event a hospital record had been disclosed which showed a diagnosis, or a suspected diagnosis, of duodenal ulcer within three to five years the applicant would have been rejected without further inquiry (R. 69).

Both claimants to the fund admitted that Saxe had spent two weeks in Beth Israel Hospital and had been treated by Dr. Fine (R. 22, 23) but contended that the concealment of that fact was immaterial because he did not have the duodenal ulcer shown by the hospital record and that this concealment was later waived by Petitioner (R. 24).

To support their first contention the claimants produced a Dr. Pope who examined the records of Beth Israel Hospital and then testified that, in his opinion, the information contained in such records did not jusitfy a final diagnosis of duodenal ulcer, although the staff members were correct in suspecting it on admission. While this testimony

is not in the printed record it is found in the opinion of the Court of Appeals, having been taken from the transcript filed with it (R. 194). The only other testimony respecting the physical condition of the insured was received from lay persons giving their opinion as to the supposed good health of the insured during this time (R. 74-78).

The contention with respect to the alleged waiver was based upon the testimony of Jane Saxe that a month before her husband died he told her that he had a previous hospital record which he had not disclosed to the insurance company and which his mother was then threatening to disclose, that on an occasion while he was building a house for Dr. Fine he had too much to drink and went to the hospital (R. 101, 126, 127) and that Dr. Fine said he would fix up something in the hospital records so as to keep his record at Columbia University straight (R. 104, 126, 127), that she told this to Brine, who was in charge of Petitioner's Washington Office (R. 104, 126, 127), who, by subsequently accepting premiums, waived any right of Petitioner to claim the policy was void because of the concealment of the stay in Beth Israel Hospital. Brine denied that he was given any information about Beth Israel Hospital (R. 115), and Petitioner contended that even if he had been given this information it was not sufficient to support a waiver because there was not a full disclosure, and because Brine had no authority under the provisions of the application (R. 153) and of the policy (R. 152) to bind Petitioner by receiving any representation or information.

This testimony with respect to the supposed cause for the stay in Beth Israel Hospital was admitted by the trial court for the sole purpose of showing the information given to Brine as a basis for the alleged waiver, but was expressly held by the trial court not to be binding on Petitioner (R. 82, 83, 85, 99, 101, 103, 109, 122, 127, 128). However, the Court of Appeals has seized upon this testimony, admitted for a limited purpose, and holds that it was

legally sufficient evidence to establish that the hospital record was fictitious (see Brief, pp. 14-17).

After a trial lasting six days, five of which were consumed by the dispute betwen the claimants to the policy proceeds, the trial court denied a motion to direct a verdict for Petitioner (R. 146, 147) and submitted the case to the jury, and a verdict for $10,000.00 in favor of Jane Saxe alone was returned in the suit which he had instituted against Petitioner (R. 143). No judgment or decree has ever been entered in the original suit filed by Petitioner, the trial court being of opinion that it was unnecessary in view of the verdict in the other case (R. 149).

The appeal was argued before three Justices of the United States Court of Appeals for the District of Columbia on November 10, 1941, (R. 187) and on January 25, 1943, the judgment below was affirmed with one Justice dissenting (R. 188).

The majority opinion (R. 188) holds:

(a) There was an issue between the parties as to whether the Beth Israel Hospital record was genuine or fictitious because of the evidence that insured was in the hospital only because of a "social lapse", that this issue affected nearly every other issue in the case, and had been decided against Petitioner on legally sufficient evidence;

(b) There was no evidence that the concealment of the hospital record was intentional, as required by Section 35-414 of the District of Columbia Code (post), and, as all the statute required was bona fide answers, the falsity of the statements in the application was for the jury to decide;

(c) To avoid the policy under the statute, post, it was necessary for the insurer to establish that the insured had the disease for which he was hospitalized and that it was the cause of death or existed when death occurred;